UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

SPECIAL TOUCH HOME CARE SERVICES, INC.[1]

Employer

and **Case No. 29-RC-10233**

NEW YORK'S HEALTH AND HUMAN SERVICES UNION 1199, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Henry Powell, a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Special Touch Home Care Services, Inc., herein called the Employer, a domestic corporation, with its principal office and place of business located at 2091 Coney Island Avenue, Brooklyn, New York, herein called its Brooklyn facility, is engaged in providing home health care services. During the past

[1] The names of the parties appear as amended at the hearing.

year, which period is representative of the Employer's annual operations generally, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of $100,000, and purchased and received at it Brooklyn facility goods valued in excess of $5,000 directly from enterprises located outside the State of New York.

Based on the stipulation of the parties and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. New York's Health And Human Services Union 1199, Service Employees International Union, AFL-CIO, herein called the Petitioner or the Union, seeks to represent a unit of all full-time and regular part-time home health aides and personal care aides employed by the Employer at all of its locations,[2] but excluding all other employees, guards and supervisors as defined in Section 2(11) of the Act.

Positions of the Parties

The Employer takes the position that the Employer's on-call employees should only be included in the unit if they work an average of at least 16 hours per week, as set forth in further detail on page 2 of the Employer's brief (see Exhibit 1, attached). In

[2] The record does not reflect whether the Employer has locations other than the Brooklyn location.

support of this position, the Employer called as its witness its Vice President of Operations, Linda Keehn.

The Petitioner takes the position that on-call employees who meet the eligibility formula set forth in *Davison-Paxon Company*, 185 NLRB 21 (1970), should be included in the unit. The Petitioner did not call witnesses.

Eligibility Formula for On-Call Employees

In determining whether on-call employees should be included in the bargaining unit, the Board considers whether the employees perform unit work, and whether their employment is sufficiently regular and continuous to demonstrate a community of interest with the remaining employees in the unit. *See S.S. Joachim and Anne Residence,* 314 NLRB 1191(1994); *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992), *enfd*., 2 F.3d 35 (3rd Cir. 1993); *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981). The "regularity" requirement is met "when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date." *S.S. Joachim and Ann*, 314 NLRB at 1193 (citing *Taj Mahal, supra).* In defining what constitutes a "substantial number of hours" in the context of a particular industry, the Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Steppenwolf Theatre Company*, 342 NLRB No. 7, slip op. at 4 (2004)(quoting *Taj Mahal*, 306 NLRB at 296; *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), *enfd*., 238 F.3d 434 (D.C. Cir. 2001)).

The Board's most widely used eligibility formula for on-call employees is the *Davison-Paxon* test, under which, "absent special circumstances, an on-call employee has

sufficient regularity of employment if the employee averages 4 or more hours per week for the last quarter prior to the eligibility date. *S.S. Joachim and Ann,* 314 NLRB at 1193 (citing *Davison-Paxon Company*, 185 NLRB 21 (1970)); *see Steppenwolf, supra*, slip op. at 4 (citing *South Coast Hospice Inc*., 333 NLRB 198 n. 3 (2001); *Saratoga County Chapter NYSARC Inc*., 314 NLRB 609 (1994); *Taj Mahal,* 306 NLRB at 295); *Five Hospital Homebound Elderly Program*, 323 NLRB 441 (1997); *People Care, Inc.,* 311 NLRB 1075 (1993); *Sisters of Mercy Health Corporation*, 298 NLRB 483 (1990); *V.I.P. Movers, Inc*., 232 NLRB 14 (1977). Where the calendar quarter immediately preceding the eligibility date is too far removed from the eligibility date, the Board uses instead the 13 weeks immediately preceding the eligibility date. *Five Hospital Homebound Elderly Program*, 323 NLRB at 441 n. 7. In the case of a new employee, hired during the quarter preceding the eligibility date, "the Board has sometimes calculated the employee's hours from the hire date up until the election date, as opposed to the eligibility date," to determine whether the employee worked, on average, at least 4 hours per week during his period of employment. *Arlington Masonry Supply, Inc*., 339 NLRB No. 99, slip op. at 4 (2003) (citing *Stockham Valve & Fittings, Inc*., 222 NLRB 217 (1976)); *see New York Display and Die Cutting Corp*., 341 NLRB No. 121, slip op. at 2 (2004).

In the instant case, the Employer's only evidence of "special circumstances" justifying its proposed formula is its witness's "recollection" that approximately 10% of the Employer's employees work less than 16 hours per week, and that approximately 2% or 3% of the employees "consistently" work less than 16 hours per week.[3] The word

[3] It is not clear from the record whether "consistently," for this witness, means 100% of the time, or some lesser percentage of the time.

"consistently" was not defined. With respect to the employees' job functions, wages, benefits and supervision, there is no evidence that employees working under 16 hours per week are treated differently from those working 16 hours or more per week.

The Employer acknowledges that the Board and this Region have consistently applied the *Davison-Paxon* standard in prior home health aide cases,[4] and it does not cite any legal authority in support of its proposed formula. The only legal precedent relied on by the Employer is *Marquette General Hospital, Inc*., 218 NLRB 713 (1975), in which the Board included in the voting unit those on-call nursing department employees who had worked a minimum of 120 hours in either of two 3-month periods immediately preceding the Decision and Direction of Election (i.e., slightly over nine hours per week, not 16 hours per week as proposed by the Employer). *See Marquette,* 218 NLRB at 714; *but see Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975)(on-call nurses who worked a minimum of 30 hours in the 11-week period immediately preceding the Decision and Direction of Election, or 2.72 hours per week, were eligible to vote). The *Marquette* decision does not explain why on-call employees who clearly met the requirements of *Davison-Paxon,* i.e., those working between 52 and 119 hours per quarter, did not share a community of interest with regular unit employees. In the nearly 30 years since *Marquette*, the Board has never utilized the *Marquette* formula in a subsequent case, and has specifically rejected the application of *Marquette* in a number of cases. *S.S. Joachim and Anne Residence,* 314 NLRB at 1193; *People Care*, 311 NLRB at 1075; *Sisters of Mercy Health Corporation*, 298 NLRB at 483. More recent cases applying the *Davison-Paxon* formula have not so much as mentioned *Marquette,* or the possibility of applying the *Marquette* eligibility formula as an alternative to *Davison-*

[4] Brief of Employer at 7-8.

Paxon. See Steppenwolf Theatre Company, 342 NLRB No. 7 (2004); *New York Display & Die Cutting Corp.*, 341 NLRB No. 121 (2004); *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99 (2003).

In light of the overwhelming legal authority outlined above, and the absence of "special circumstances" requiring the application of the novel formula proposed by the Employer, I conclude that the on-call employees meeting the *Davison-Paxon* eligibility formula should be included in the bargaining unit. I find the following unit to be appropriate for the purposes of collective bargaining:

> All full-time and regular part-time home health aides and personal care aides, but excluding all other employees, guards and supervisors as defined in Section 2(11) of the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they

appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by New York's Health And Human Services Union 1199, Service Employees International Union, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **July 27, 2004**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **August 3, 2004.** The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: July 20, 2004, Brooklyn, New York.

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Alvin P. Blyer
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National Labor Relations Board
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